

ZHENG (Migration) [2023] AATA 1297 (8 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Fei Zheng
CASE NUMBER:	1821250
HOME AFFAIRS REFERENCE(S):	BCC2016/581605
MEMBER:	Moira Brophy
DATE:	8 May 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • CI 820.211 of Schedule 2 to the Regulations; and • CI 820.221 of Schedule 2 to the Regulations.

Statement made on 08 May 2023 at 3:43pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – joint home and car purchase – joint bank account – shared travel to visit families – companionship and emotional support – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 9 February 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied that the applicant was in a genuine and continuing relationship with his sponsor.
4. The applicant appeared before the Tribunal on 1 December 2022 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Danmin Li, who is the applicant's sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

6. Background

7. The applicant, Mr Fei Zhang is a 29-year-old male currently residing in Sydney. He has declared no previous relationships. His parents live in China and he has one sister living in America.
8. The sponsor, Ms Danmin Li is a 29-year-old female living in Sydney. She has declared no previous relationships. She was born in China and came to Australia on 3 February 2010 with her father. She was granted a resident Return (subclass 155) visa on 20 March 2015. Her parents and one brother are in Australia.
9. At the time of application, the parties stated they met on 1 September 2004 when they both attended the same school in Fuzhou, China. The applicant entered Australia on a Prospective Marriage (subclass 300) visa which was granted on 27 October 2015 and they committed to a shared life to the exclusion of all others on 22 November 2015, being the date they married in Australia.

CONSIDERATION OF CLAIMS AND EVIDENCE

Tribunal proceedings

10. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the applicant and sponsor at the hearing.
11. The parties gave coherent oral evidence about the circumstances in which they met, the development of their relationship and their current living arrangements.

12. The Tribunal accepts the parties' oral evidence that they met in person on 1 September 2004 when they first met at school. Their relationship continued long distance as the sponsor came to Australia in 2010. They committed to a relationship with each other to the exclusion of all others in 2014 and applied for a Prospective Marriage (subclass 300) visa. They were married on 22 November 2015 in a civil ceremony and they registered their marriage in Australia. They lodged this application on 9 February 2016.

Whether the parties are in a spouse or de facto relationship

13. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claims to be the spouse of the sponsor who is an Australian citizen.
14. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 22 November 2015 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

16. Financial

17. The Tribunal considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; the extent of pooling of financial resources; any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
18. The parties reside together in a home that was purchased by the applicant and sponsor in joint names in December 2021. They do not have a mortgage on the property as they purchased with money they received from the mother of the applicant. Prior to that they lived with the parents of the sponsor in a two-bedroom property they rented at Bankstown. They paid rent of \$500 per week which also included their food.
19. The sponsor works in a sushi shop five days a week. She has worked there for more than three years. She is paid around \$1000 per week. Her pay is electronically transferred into an account in both parties' names. The applicant works five to six days per week as a tiler. Since 2020 he has been a sole trader. His pay is variable and is generally between \$450 and

\$1500 per week and he is paid into their joint account. He is sometimes paid in cash. He does not have any employees and he does both residential and commercial work.

20. The parties gave consistent evidence that they are both able to access the joint account but they each had accounts in their own names which the other party was not able to access. It was evident from the bank statements provided that they receive large amounts of money from the applicant's mother. They had savings of around \$23,000 in their joint account and a perusal of the bank statements provided is indicative of their meeting day-to-day expenses from their joint account as well as paying for the utilities.
21. They have a car they purchased in joint names in March 2021. They paid \$14,000 for the car from their joint savings.
22. The Tribunal carefully considered the evidence as to whether the financial arrangements were consistent with the parties being in a genuine and continuing relationship as the parties were reticent when asked specific questions as to their finances. The Tribunal was concerned there were large amounts of money being paid into accounts that were in excess of their stated earnings.
23. Overall, the Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship both at the time of application and at the time of decision.

24. *Nature of the household*

25. In considering the nature of the household, the Tribunal has considered the evidence including any joint responsibility for the care and support of children; the parties' living arrangements; and any sharing of housework.
26. The Tribunal accepts the parties have lived together on a continuing basis since 2015.
27. The parties provided consistent and convincing evidence regarding the arrangements for their household. The sponsor is responsible for the majority of the household chores, the cooking, and the washing but the applicant assists whenever he is able.
28. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.
29. The Tribunal finds the nature of the household is consistent with their being in a genuine spousal relationship at the time of application and at the time of decision.

30. *Social aspects of the relationship*

31. In considering the social aspects of the relationship, the Tribunal has considered whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
32. The parties provided a number of statutory declarations from family and friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.
33. The parties provided documentary evidence to support their oral evidence at the hearing that they have enjoyed trips together to China to visit the applicant's and sponsor's families. The evidence was also consistent in that they did not stay together on those visits as they had

not celebrated their marriage with a cultural ceremony in China and they therefore could not stay together.

34. On the basis of the oral evidence of the parties and the evidence provided by way of photographs, the Tribunal finds that the relationship between the applicant and his sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends, and the wider community.

35. The Tribunal finds the social aspects of the relationship are consistent with their being in a genuine spousal relationship at the time of application and at the time of decision.

36. Nature of the persons' commitment to each other

37. In considering the nature of the persons' commitment to each other, the Tribunal considered the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

38. The Tribunal finds that the applicant and his sponsor have been in a committed relationship since they married in 2015. They have lived together continuously since 2015.

39. The parties were familiar with the details of each other's family and with each other's daily work schedules.

40. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future was consistent. The Tribunal is satisfied that the applicant and his partner are committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuing relationship.

CONCLUSION

41. The Tribunal has had the benefit of receiving oral evidence in person from the parties, as well as seeing the parties interact with each other. It has also received a considerable amount of additional information that was not before the delegate. The Tribunal accepts the parties were inexperienced and that led to them not understanding the type of documentation required by the original decision maker.

42. Given these findings, the Tribunal is satisfied that at the time of application, the parties were in a genuine and continuing relationship, and at the time of this decision, the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.

43. Accordingly, the Tribunal finds that the applicant satisfies the definition of 'spouse' in s 5F(2) (a)-(d) and the parties are in a spousal relationship.

44. As the requirements of cl 820.211(2) are met, the Tribunal finds that cl 820.211 is satisfied.

45. The Tribunal further finds that at the time of the Tribunal's decision, the applicant continues to be the spouse of the sponsor and continues to meet the requirements in cl 820.211(2), thus satisfying cl 820.221(1).

46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

47. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- CI 820.211 of Schedule 2 to the Regulations; and
 - CI 820.221 of Schedule 2 to the Regulations.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).